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June 10, 2008

Mr. John P. Schnitker
Mr. John J. Kim
Office of the Legal Advisor
U.S. Department of State
Washington, D.C.

Dear Messrs. Schnitker and Kim:

We are writing to share with you some additional analysis following last Monday's meeting on the topic of a federal agency's duties under the National Environmental Policy Act (NEPA) when that agency is presented with successive requests for federal permits, licenses, or other types of regulatory approvals. This letter discusses why, if TransCanada does announce an open season for the planned Keystone XL (KXL) pipeline at some point in the relatively near future, there should be no adverse consequences for the integrity and defensibility of the Environmental Impact Statement (EIS) completed last year for the Keystone Pipeline. Also, we respectfully offer our views on how best to address prospective NEPA obligations the Department of State may have if TransCanada does submit a border-crossing application for a proposed KXL pipeline.

As discussed below, we do not believe that the present, ongoing status of an emerging proposal involving the KXL pipeline should affect the integrity of the Keystone EIS because at the time that the Keystone EIS was being prepared, the KXL pipeline was not yet at a point where it could be seen as "reasonably foreseeable" under the provisions of the National Environmental Policy Act (NEPA), as interpreted by the Council on Environmental Quality. That tentative status remains true today; the company still has not finalized sufficient commitments from anchor shippers to justify proceeding with a formal application. The fact that the company is engaged in survey and landowner outreach activities does not imply that a decision has been made to undertake the project. Those activities must be commenced at this time, so that the project will be adequately advanced to meet market needs, in the event a decision is made to go forward with an application. The company, of course, remains at risk for all such project development costs, in the event no project goes forward.

If TransCanada does conclude that the proposed concept of the KXL pipeline has become economically viable, at that point it will decide whether to make a formal application pursuant to Executive Order 13337. Should the company file such an application, only then would KXL

REVIEW AUTHORITY: Adolph Eisner, Senior Reviewer



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ripen into a formal proposal for federal action. Because State has already issued a Record of Decision for the Keystone Pipeline, the appropriate focus for the agency's NEPA duties with respect to any KXL application would be a new EIS to study that specific proposal as a separate, stand-alone project.

Statute and Regulations Involved

Under Section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c), a federal agency must include an environmental impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Regulations implementing NEPA have been promulgated by the President's Council on Environmental Quality (CEQ), and are especially helpful in interpreting this broad, sweeping statutory command. With relevance to the question considered here, the "effects" that need to be evaluated in an EIS include "direct effects" which are "caused by the action and occur at the same time and place" 40 C.F.R. § 1508.8(a), and "indirect effects" which "are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). CEQ also requires that an EIS include discussion of not only direct and indirect effects of a proposed action, but also the "cumulative impact" of proposal. "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions." 40 C.F.R. 1508.7.

Analysis

1. The KXL pipeline is still under consideration by TransCanada. The company has not finalized a proposed route, obtained binding anchor shipper commitments for use of the pipeline, or commenced an open season for additional shipper commitments. For these reasons, TransCanada is not at a point where it is prepared to make a formal application to site and construct the pipeline. Absent a proposal from TransCanada, NEPA imposes no duties on any federal agency. "NEPA does not require evaluation of hypothetical proposals, impacts, and alternatives concerning a nonexistent federal proposal." *U.S. v. South Florida Water Management Dist.*, 28 F.3d 1564, 1573 (11th Cir. 1994). Thus, unless and until the KXL concept ripens into a specific proposal for federal action, there is no NEPA obligation to prepare a new EIS addressing the KXL pipeline. Moreover, since KXL remains even today sufficiently speculative and uncertain as to not trigger its own obligations under NEPA, there can be no basis for asserting that State had a duty to include a discussion of KXL during the review of cumulative impacts while it was preparing the Keystone EIS.

As a general rule, a federal agency should not prepare an EIS until it reaches the critical stage of a decision which will result in irreversible and irrevocable commitments of resources to an action that will affect the environment. *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43 (D.C. Cir. 1999). Until the "action" known as the KXL pipeline is defined and



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located with specificity, its potential environmental impacts remain unknown and hypothetical. Federal agencies do not prepare impact statements or address potential impacts that are based on hypothetical events. *Weinberger v. Catholic Action Peace Project*, 447 U.S. 352 (1980). Thus, State has no obligation to prepare a new EIS to address the KXL pipeline, and it also has no obligation under NEPA to add a discussion of the KXL concept to any EIS involving Keystone. This is the same result as applies to prospective projects under consideration by non-affiliates of TransCanada. For example, State was not required to address the potential impacts of other prospective, conceptual crude oil pipeline projects from the Canadian Oil Sands in the Keystone EIS. Indeed, the "Altex Energy" project has had a website and been under consideration since at least 2005, yet because it has not ripened into a proposal warranting an application, the Keystone application did not have to consider that the cumulative impact of prospective project.

In a related context, it was appropriate for the Federal Aviation Administration to consider the environmental impacts of relocating a runway at the Albuquerque Airport, but the FAA's environmental analysis did not need to include a study of a new airfreight terminal because, unlike the runway (which was ready to be reconstructed), the contemplated freight terminal had not yet ripened into a specific proposal and was not yet "reasonably foreseeable." *Airport Neighbors Alliance v. United States*, 90 F.3d 426 (10th Cir. 1996). This degree of uncertainty eliminates the obligation to review certain environmental effects because they are "too speculative to warrant consideration." *Sierra Club v. Marsh*, 769 F. 2d 868, 878 (1st Cir. 1985).

The "reasonably foreseeable" test translates into what a person of ordinary prudence would take into consideration when making a decision. *Sierra Club v. Marsh*, 976 F.2d 763 1st Cir. 1992). For NEPA purposes, the contemplated freight terminal at the Albuquerque Airport was not "reasonably foreseeable" even though it was described on the Airport's Master Plan. That was because the commitment to reconstruct and upgrade the runway did not necessarily signal a commitment to proceed with the rest of the Master Plan. *Airport Neighbors Alliance*, 90 F.3d at 430. The court's opinion refers to another case where it had rejected a similar demand for cumulative impact analyses, reasoning that such a review would result in "a gross misallocation of resources, would trivialize NEPA and would diminish its utility in providing useful environmental analysis...." *Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609, 623 (10th Cir. 1987). As the Supreme Court declared in a related context, "Where no ... plan exists, any attempt to produce an impact statement would be little more than ...[an] estimate[] of potential development and attendant environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1976). These judicial declarations aptly describe the situation that State was in with respect to KXL during the entire pendency of consideration of the Keystone permit. Moreover, that status has not changed as of today.

For these reasons, State had no obligation under NEPA to address KXL during the course of preparing the Keystone EIS. The integrity and defensibility of that document remains unaffected by any TransCanada action regarding KXL. A decision by TransCanada to conduct a KXL open season does not create a legal obligation under NEPA with respect to either the



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Keystone EIS or with regard to a new, separate and independent study of the KXL concept. The KXL action is not yet "reasonably foreseeable" and its potential impacts cannot be quantified or examined with the requisite degree of specificity to make such analysis useful in any EIS.

2. Should the KXL pipeline develop beyond its conceptual framework and ripen into a proposal for action by virtue of TransCanada's application for a permit under Executive Order 13337, it is clear that the KXL pipeline should have its own separate NEPA review, rather than a supplemental study to the existing Keystone EIS. This is so for two reasons. First, CEQ regulations speak to the need for a supplemental EIS if the federal agency makes significant changes to the *proposed* action, or if there is significant new information bearing on the *proposed* action. 40 C.F.R. § 1502.9(c). That is because the duty to prepare an EIS is tied to a "proposed" action, as opposed to some ongoing generalized duty to revisit past determinations. Indeed, where an agency is merely continuing with an existing program, courts have held that there is no "proposal" for federal action, and no duty under NEPA to prepare any environmental analysis. *Northcoast Environmental Center v. Glickman*, 136 F.3d 660 (9th Cir. 1998). Put slightly differently, when there is no proposal for federal action, there is no obligation to prepare an EIS. *Fund for Animals Inc., v. Thomas*, 127 F.3d 326 (D.C. Cir. 1997). Because the Keystone EIS has been completed and a ROD issued on the Keystone permit, there is no remaining proposed action for State to take with respect to Keystone that would warrant preparing a supplemental EIS.

Second, a supplemental EIS can be helpful when its inclusion of additional, cumulative impacts provide the opportunity for study that would otherwise evade NEPA review. Thus, when courts examine whether particular actions should be considered cumulative impacts of other, proposed actions, they ask if the actions were "so interdependent that it would be unwise or irrational to complete one without the others." *Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974). However, where multiple actions each have "independent utility" and will be treated to their own review under NEPA, there is no basis for insisting that projects only under contemplation be reviewed as a cumulative impact of an action that has been proposed for approval. *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976). As we have discussed, treating a KXL project separately for NEPA purposes will not leave any aspect of either the Keystone or KXL projects unreviewed. The full impacts of both projects would be fully scrutinized.

To summarize this point, the Keystone pipeline has independent utility from the KXL concept. As you know, construction of Keystone is now underway, even as planning for a possible KXL proposal continues. Moreover, the best way to identify all impacts (direct, indirect, and cumulative) associated with these pipelines is to await the KXL proposal and use that EIS to address the appropriate universe of impacts.



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Thank you for your consideration of these thoughts. We welcome the opportunity to discuss these matters at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter R. Steenland".

Peter R. Steenland

cc: Jim P. White
TransCanada